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### EX PARTE

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C.

Re: MB Docket No. 02-144

Dear Ms. Dortch:

On January 14, 2005, David H. Permar (Hatch, Little & Bunn & Counsel to Triangle J Council of Governments), Robert Sepe, (Manager, Action Audits, LLC & Cable Consultant to Triangle J Council of Governments) and Catharine Rice (Associate, Action Audits) met on behalf of over 26 North Carolina local governments who are members of the Triangle J Council of Government Cable Consortium with the following Media Bureau staff: Marjorie Greene, John Norton, Kenneth Lewis and Steven Broeckaert.

During our meeting we discussed, from a local community perspective, two issues addressed in the above Notice of Proposed Rulemaking and Order: 1) cable operators' use of the Form 1235 to recover upgrade costs; and 2) Petitions for Effective Competition to revoke local franchising authorities' basic rate regulatory authority. We noted the NCTA recently raised both these issues in ex-parte filings with FCC staff.

More specifically, we described local communities' concern that the Form 1235 could be allow over-recovery by cable operators of their cable system upgrade costs. We described the history of how cable operators have been recovering the costs of their system upgrades for many years. For example, Time Warner began to pre-capitalize these costs under its Social Contract in 1995 and continues to recoup these costs under the Form 1235 to this day, ten years later. We noted that it is reasonable for local governments to ask for an accounting of the total amount of the upgrade that has already been collected and any amount that remains to be collected. If full recovery of an upgrade investment has been obtained, there is no longer a need for the Form 1235. If cable operators choose to use the Form 1235 to charge off a portion of the upgrade investment to regulated cable service subscribers, the Form 1235 should be updated by the operator to reflect current cable system characteristics, such as the current number of subscribers,

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bandwidth use and adjustments for accumulated depreciation. (Some cable operators appear to be double-dipping -- taking a depreciation expense for the upgrade investment, while also recovering the full investment from regulated service subscribers without adjusting that value for accumulated depreciation).

Mr. Sepe noted that the Form 1235 is not a "one-time" filing (as the cable industry has claimed). Cable operators must file the final cost of their upgrade investment only once. Sepe also noted the importance of updating Form 1235 as he distributed a handout that documented the enormous subscriber growth in a number of Triangle J COG communities (e.g. Morrisville -- 89%) since the original Form 1235 was filed in 2000. This naturally leads to accelerated recovery. At the very least, subscribership growth should result in a lower upgrade add-on charge per customer because the cost of the upgrade is distributed over many more households. However, the local operator has not modified the add-on charge to reflect these new circumstances. Operators have also activated new bandwidth since their original Form 1235 filing, which should again reduce the proportion of the operator's upgrade investment recoverable from subscribers served by regulated service bandwidth.

We made three main points with regards to Petitions for Effective Competition. We discussed a concern that local communities, who are not experiencing effective competition, could be rate deregulated under the "state-wide" average approach advocated by the NCTA. We noted first that existing federal law requires that the area that is to be measured for effective competition is the franchise area -- county or municipality -- not the entire state. Mr. Permar revealed in a handout how the use of a state-wide average for North Carolina would deregulate local communities where effective competition does not exist. He also noted that despite the cable industry's claim that it was losing market share to the satellite industry, its own local advertising was claiming it had recaptured vast numbers of satellite subscribers.

During this discussion, we also offered a solution for obtaining more current occupied household totals in local communities (the denominator in the 15% competing provider test): require cable operators to obtain a certified list from LFAs of each address and 5-digit zipcode of all the occupied households in their franchise area. (This will also alert LFAs that the operator has begun a process to remove their regulatory authority.) Cable operators could then quickly obtain the 5+4 zipcodes from this information and the 5+4 satellite subscriber totals from the SBCA. The operator would then provide a copy of that information to the LFA prior to submission to the FCC for consideration. Such a procedure would lend integrity and accuracy to the process, which currently allows inaccurate DTH counts based on over-inclusive 5-digit zipcode data and (5-year old) Census household data.

We also conveyed that we agree with the NCTA that the price charged by SBCA for 5+4 DBS totals is prohibitively expensive, and noted that the current price has prevented at least 5 local North Carolina communities, who were recently deregulated (through the use of 5-digit data covering areas much broader than their local franchise areas), from Petitioning for Recertification by using 5+4 data specific to their franchise areas. We noted that we had discussed the prohibitively high price with the SBCA, who told us that they had negotiated these rates with the NCTA over eight months and could not lower the 5+4 price without the NCTA "having a fit." We corrected the misimpression that we had asked for a preferential price to that charged the NCTA. We had asked the price of the "plus-four" data to be lowered for everyone ordering it -- and had suggested the "plus-four" data be priced at one penny per "plus-four"

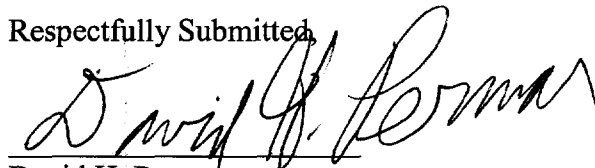
zipcode. (This would put on more equal footing the prices charge for the 5-digit and 5+4 data). We asked for the FCC's assistance in making this data available.

Finally, we suggested a method for obtaining a more accurate count of the "dual subscribers" (households subscribing to both satellite and cable service) which the FCC rules require be excluded from the final DTH totals. Cable operators could create a proportion within each 5+4 street segment, by comparing the number of total occupied households in each 5+4 segments (obtained from LFAs as described above) to the number satellite subscribing households (obtained from SBCA) and cable subscribing households (from their own records) in that same 5+4 segment. (Assuming 100% service penetration, 5+4 segment with 20 total occupied households, 18 cable subscribers and 5 satellite subscribers, indicates a minimum overlap of 3 households (15%) subscribing to both services. Those 3 households are "dual subscribers;" the raw DTH count must be adjusted by the dual subscriber ratio.)

In closing, we noted that local elected and appointed officials overwhelm us with complaints that cable rates are simply "too high." They continually ask us "why can't we have competition?" indicating they do not believe competition exists. We conveyed to the FCC staff that the standard Congress crafted to define effective competition is failing – that it should be based on real indicators of price competition (price constraint). While we understood that redefining the present criteria would require persuading Congressional representatives to set a new standard, we suggested that it is time for the FCC to update its "competitive differential" and establish a new benchmark. The current benchmark was set 12 years ago. We noted that the GAO reported last February that where wireline competition existed in local markets, cable rates were between 15% and 41% lower than in franchise areas without wireline competition. (This data was drawn in part from the FCC's yearly cable pricing and competition data.)

Three handouts, attached to this letter, were distributed in the meeting: Handout 1: Customer Growth; Handout 2: Why Statewide DBS DTH penetration is Meaningless for the Purpose of Determining Whether an LFA is subject to Effective Competition; and Handout 3: *Raleigh Observer* ad: "79,000 Satellite Customers Switch back to Time Warner Cable."

Respectfully Submitted,



David H. Permar

Council to Triangle J. Council of Governments

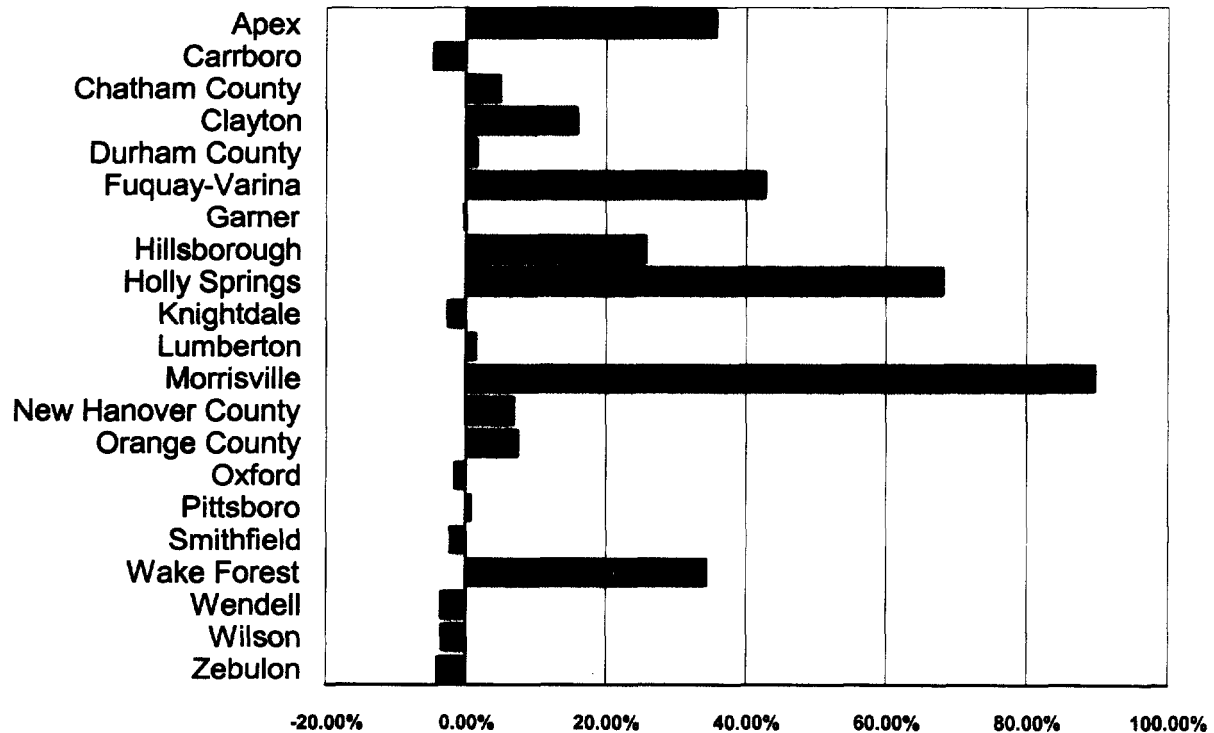
Attachments

cc: Marjorie "Peggy" Greene  
John Norton  
Steve Bröeckert  
Kenneth Lewis

## Customer Growth

Community	2001	2004	Delta
Apex	4977	6759	35.80%
Carrboro	4634	4414	-4.75%
Chatham County	2382	2502	5.04%
Clayton	1797	2084	15.97%
Durham County	10074	10238	1.63%
Fuquay-Varina	1549	2213	42.87%
Garner	5043	5024	-0.38%
Hillsborough	888	1117	25.79%
Holly Springs	1472	2476	68.21%
Knightdale	1369	1333	-2.63%
Lumberton	5090	5167	1.51%
Morrisville	1810	3436	89.83%
New Hanover County	17583	18805	6.95%
Orange County	6050	6506	7.54%
Oxford	2196	2159	-1.68%
Pittsboro	502	506	0.80%
Smithfield	2392	2337	-2.30%
Wake Forest	3163	4254	34.49%
Wendell	805	834	3.60%
Wilson	11734	12147	3.52%
Zebulon	838	803	-4.18%

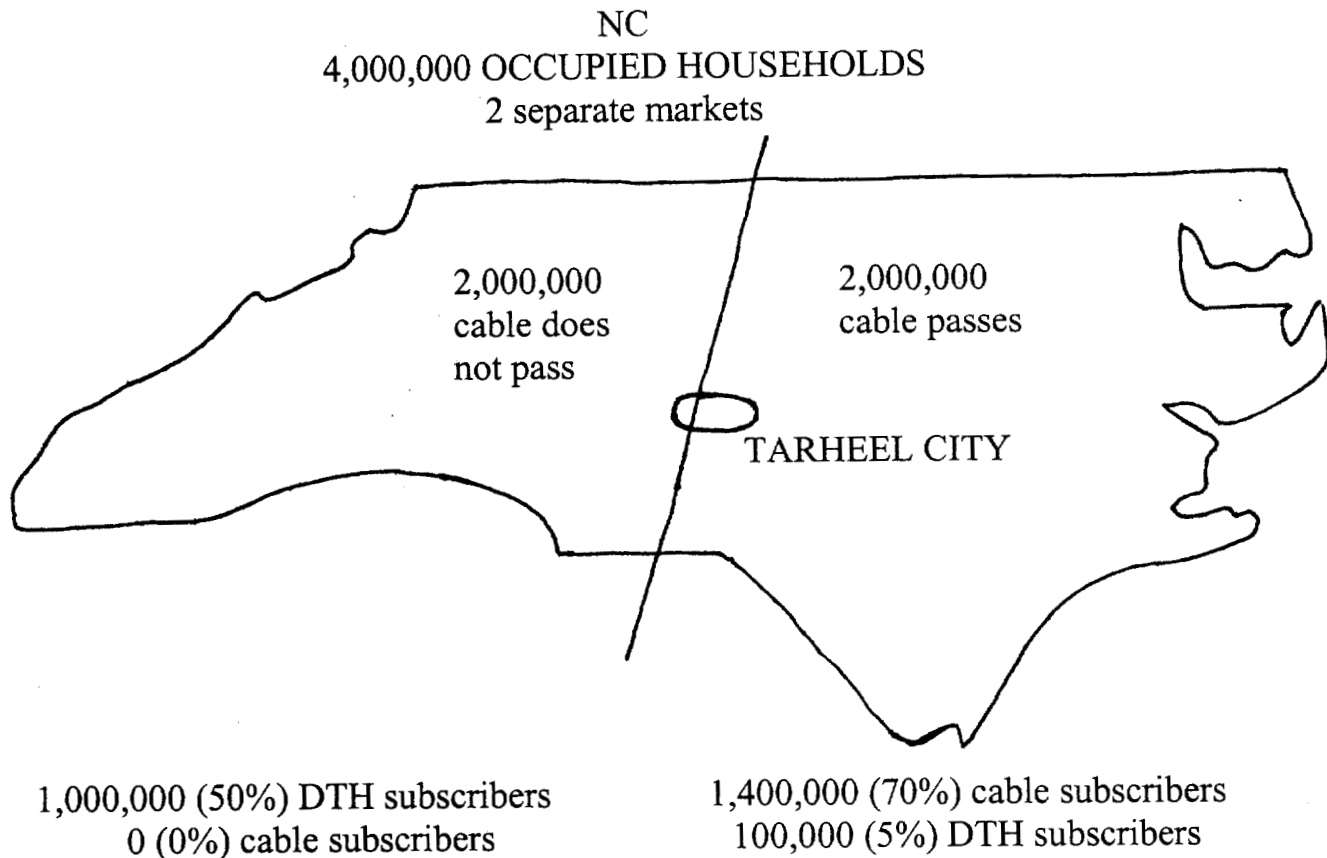
## Percent Change in Customer Base: 2001-2004



WHY STATEWIDE DTH PENETRATION IS MEANINGLESS FOR THE  
PURPOSE OF DETERMINING WHETHER A LFA IS SUBJECT TO  
"EFFECTIVE COMPETITION"

REPORTED DTH PENETRATION FOR NC IN APRIL 2004: 23.56%

HYPOTHETICAL



STATEWIDE

27.5% DTH penetration

35% cable penetration

TARHEEL CITY

200,000 occupied households

20,000 (10%) cable does not pass  
10,000 (50%) DTH subscribers  
0 cable subscribers

180,000 (90%) cable passes  
126,000 (70%) cable subscribers  
9,000 (5%) DTH subscribers

combined for franchise area  
63% cable penetration  
9.5 % DTH PENETRATION

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